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In the

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

v.

E.I. DU PONT DE NEMOURS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND IN SUPPORT OF PETITIONER SHARON B. POLLARD

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INTEREST OF AMICI CURIAE[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs before this Court, singly or jointly with other amici. Some recent cases include *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Kolstad v. American Dental Association,* 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association. ATLA's approximately 50,000 attorney members represent plaintiffs in civil actions, including employees seeking to vindicate their rights under federal civil rights statutes against discrimination in the workplace. Title VII actions serve as an important means for safeguarding those rights. In ATLA's view, the lower court's decision in this case

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[1] Copies of the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, amici state that no persons other than the amici curiae, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

undermines the purpose of Congress in affording this remedy, the elimination of illegal workplace discrimination.

The Connecticut Women's Education and Legal Fund (CWEALF) is a statewide non-profit organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. Founded in 1973, CWEALF has worked for over 27 years on the issue of sexual harassment as well as gender bias in the courts. CWEALF offers workshops on sexual harassment prevention and response to employers, supervisors and employees. It also provides legal information and referrals to women who have been the target of discrimination and harassment.

The interest of NELA, ATLA and CWEALF in this case is to protect the rights of their members' clients and their members, by ensuring that Title VII's goal of eradicating employment discrimination is fully realized. This cannot happen when Title VII is interpreted in a way that prevents courts from providing equitable and monetary relief sufficient to make plaintiffs whole. *Amici* submit this brief because of the importance of the issues at bar to furthering their goals.

INTRODUCTION

With the exception of the Sixth Circuit, federal trial and appellate courts have uniformly concluded that front pay awards are not subject to the monetary caps established by section 102 of the Civil Rights Act of 1991 ("1991 Act").[2] The Sixth Circuit's contrary conclusion[3] misconstrues the plain language of the 1991 Act. Importantly, it will also operate to withhold full relief for victims of the more severe or egregious forms of employment discrimination. Front pay awards for employees who cannot be reinstated because of the harshness of their treatment or the continued hostility between the parties will have their access to compensatory damages reduced by the amount of front pay they are awarded. This will have the perverse effect of rewarding those employers who persist in their antagonism toward a proven target of discrimination. In contrast, reinstatement will be available for the employees of employers who are able to adopt a more benign posture, and in appropriate cases, these employees will also have the full amount of compensatory damages available to them.

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[2] *See* Rev. Stat. §1977A, as added Pub.L. 102-166, 105 Stat. 1072; section 102 is codified at 42 U.S.C. §1981a. Section 102 will hereafter be referred to as "section 1981a."

[3] The court below professed its agreement with the reasoning of other circuits but was bound by the earlier decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997).

SUMMARY OF ARGUMENT

The 1991 Act was enacted to augment the relief available under Title VII of the Civil Rights of 1964. It provided victims of gender, religious and disability discrimination in employment with the right to an award of compensatory and punitive damages.[4] The Act also imposed monetary limits—or "caps"—on the amount of such damages that could be awarded. In enacting the caps, however, Congress was at pains to make clear that the caps were applicable *only* to the newly allowed remedies and not to the relief already authorized by Title VII. That relief included the award of front pay in lieu of reinstatement.

Only the Sixth Circuit has concluded that the caps on compensatory and punitive damages apply to awards of front pay. This conclusion fairly flouts the express language of the 1991 Act, which defines compensatory damages as a remedy "in addition to" the relief previously allowed under Title VII, and which applies the caps only to relief awarded under the 1991 Act.

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[4] Section 1981a's caps apply only to claims of gender, religious and disability discrimination. Victims of race or national origin discrimination have uncapped monetary remedies available under section 1981 (42 U.S.C. §1981). *See Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975). Section 1981a recognizes the dichotomy between gender and religious discrimination and discrimination on the basis of race, color or national origin under Title VII by providing that the compensatory and punitive damages it authorizes are available "provided that the complaining party cannot recover under section 1981 of this Title." *See* 42 U.S.C. §1981a(a)(1). Section 1981a(a)(2) authorizes awards of compensatory and punitive damages in connection with claims filed under the Americans With Disabilities Act. *See* 42 U.S.C. §1981a(a)(2).

The holding of the Sixth Circuit will frustrate the purposes of that Act by permitting results that will actually *reduce* rather than augment the relief available to covered victims of discrimination. Prior to 1991 Title VII allowed awards of front pay without any fixed limitation. Under the reasoning of the Sixth Circuit, those awards may now be capped. This result will be especially perverse in situations where an award of compensatory or punitive damages under the 1991 Act is now appropriate. The target of discriminatory conduct who would normally be allowed an award of compensatory and punitive damages, albeit capped at a maximum of $300,000, plus an award of front pay under the law as it was applied prior to 1991, will now be limited to a total award of $300,000. This result, exactly what has happened in this case, is directly contrary to the intent of Congress in enacting the 1991 Act.

For these reasons, *Amici* urge the Court to reverse the decision below.

ARGUMENT

Front Pay Is Not To Be Counted Toward The Caps On Compensatory And Punitive Damages, Since It Was Among The Remedies "Authorized By Section 706(G) Of The Civil Rights Act Of 1964."

A. Front Pay Was An Important Part Of Title VII's Remedial Scheme Prior To The Enactment Of The 1991 Act.

Section 706(g) of Title VII, in place since 1964, provides that a court may "order such affirmative action as may be appropriate, which may include, but is not limited to

reinstatement or hiring of employees, with or without backpay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). More than twenty-five years ago this Court held that section 706(g) implemented Congress's central purpose "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper v. Moody*, 422 U.S. 405, 418 (1975). *See also Franks v. Bowman Transp. Corp.*, 424 U.S. 747, 764 (1976) (Section 706(g) "empowered [the federal courts] to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.").

Back pay and reinstatement were the remedies of choice, especially in the early years when Title VII litigation more frequently addressed the broad systemic effects of entrenched race discrimination. However, the lower courts also recognized early on that reinstatement was not always feasible, and that when it was not, an award of front pay was a necessary part of the "make whole" relief mandated by Congress and this Court. *See e.g.*, *United States v. United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973), *vacated in part and appeal dismissed in part on other grounds*, 520 F.2d 1043 (5th Cir. 1975); *Bush v. Lone Star Steel Co.*, 373 F.Supp. 526 (E.D. Tex. 1974); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir. 1976) (where reinstatement or promotion is not immediately feasible, back pay "should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position."); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158-9 (6th Cir.

1985) ("Front pay is . . . simply compensation for the post-judgment effects of past discrimination." It is awarded "to effectuate fully the 'make whole' purposes of Title VII.").

Although, unlike back pay and reinstatement, front pay is not expressly mentioned in section 706(g), the lower courts have uniformly recognized that "frontpay is the functional equivalent of reinstatement," and that as such it "falls squarely within the statutory language authorizing 'any other equitable relief.'" *Williams v. Pharmacia*, 137 F.3d 944, 952 (7th Cir. 1998) (citations omitted). *See also Cowan v. Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998) (an award of front pay is an alternative to reinstatement); *Selgas v. American Airlines, Inc.*, 104 F.3d 9, 12 (1st Cir. 1997) (same). As explained by the Seventh Circuit in *Williams*, "[f]ront pay in the Title VII context is best understood as 'a monetary award equal to the gain [the plaintiff] would have obtained if reinstated.'" *Id.*[5]

The legitimacy of front pay awards under the authority of section 706(g) has never been challenged in this Court. Nonetheless, on a number of occasions the Court has implicitly recognized that legitimacy. *See Franks, supra,*

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[5] Front pay is also awarded under other federal statutes regulating employment. *See e.g., Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987) (Age Discrimination in Employment Act: "[F]ront pay is an award of future lost earnings to make a victim of discrimination whole."), *cert. denied*, 484 U.S. 1047 (1988); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998) (Family and Medical Leave Act); *Jones v. Kerrville Stage Hosp.*, 142 F.3d 263 (5th Cir. 1998) (Americans with Disabilities Act); *Doll v. Brown*, 75 F.3d 1200 (7th Cir. 1966) (Rehabilitation Act).

424 U.S. at 777 n. 8 (noting as an alternative remedy "the possibility of an award of monetary damages (sometimes designated 'front pay')") and 424 U.S. at 781 (Burger, C.J. concurring) ("An award such as 'front pay' could replace the need for competitive-type seniority relief [and] would serve the dual purpose of deterring wrongdoing by the employer or union—or both—as well as protecting the rights of innocent employees."); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361-62 (1995) (where an employer has after-acquired evidence of severe misconduct on the part of the plaintiff, "neither reinstatement nor front pay is an appropriate remedy"); *United States v. Burke*, 504 U.S. 229, 239 n.9 (1992) (in considering the taxability of back pay awards, the Court noted that "some courts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover 'front pay' or future lost earnings.").

By the time Congress began to consider the statute that became the 1991 Civil Rights Act, all circuits considering the issue, including the Sixth Circuit, treated front pay as an available remedy under this Section. *See Thompson v. Sawyer*, 678 F.2d 257, 292 (D.C. Cir. 1982) ("A number of circuits have approved the use of such front pay to make plaintiffs whole for the losses caused by discrimination and we join them."); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991) ("Where reinstatement is not appropriate, then other remedies must be considered. We join virtually all circuits that have considered the subject in concluding that front pay is an available remedy to complete the panoply of remedies available to avoid the potential of future loss."). *See also Powers v. Grinnell Corp.*, 915 F.2d 34, 42 (1st Cir. 1990);

Bruno v. W.D. Saunders Co., 882 F.2d 760, 772 (3rd Cir. 1989); *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 870 (5th Cir. 1991); *Shore v. Federal Express*, 777 F.2d 1115, 1159 (6th Cir. 1985); *Morgan v. Arkansas Gazette*, 897 F.2d 945, 954 (8th Cir. 1990); *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984); *Wulf v. City of Wichita*, 883 F.2d 842, 873 (10th Cir. 1989); *Wilson v. S&L Acquisition Co.*, 940 F.2d 1429, 1438 (11th Cir. 1991).

B. The 1991 Act, Which Provided New But Limited Remedies For Victims Of Intentional Discrimination, Was Clearly Intended To Preserve *Without Limit* The Remedies Previously Available Under Section 706(g).

The Civil Rights Act of 1991 expanded upon the remedies available under section 706(g) by allowing victims of intentional discrimination to recover compensatory and punitive damages, although the amounts that may be awarded are capped. *See* 42 U.S.C. §1981a(b). The plain language of the 1991 Act makes clear that these new remedies are over and above those previously "authorized," and that the latter remedies are not to be subject to the monetary caps placed on compensatory and punitive damages. Thus the Act expressly provides that the newly allowed "compensatory and punitive damages [are] *in addition to any relief authorized by Section 706(g).*" 42 U.S.C. §1981a(a)(1) (emphasis supplied). To emphasize that "compensatory and punitive" damages are not to overlap or subsume the remedies already available under Section 706(g), the Act also contains a definitional provision stating that "[c]ompensatory damages . . . shall

not include backpay, interest on backpay, *or any other type of relief authorized under Section 706(g).*" 42 U.S.C. §1981a(b)(2) (emphasis supplied). Finally, the Act imposes caps only on "compensatory damages *awarded under this section* for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. §1981a(b)(3) (emphasis supplied).

Probably the most basic maxim of statutory construction is "that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Here, the language of the statute—the 1991 Act—is dispositive of the issue before the Court.

The 1991 Act for the first time allowed an award of compensatory damages to successful Title VII plaintiffs. In doing so, it *expressly* defined compensatory damages as *excluding* "any . . . type of relief authorized under section 706(g)" of Title VII. As we have shown, there is no question that front pay was so "authorized." Moreover, the monetary caps are expressly made applicable only to "compensatory damages awarded under *this* section." 42 U.S.C. §1981a(b)(3). The phrase "this section" necessarily refers to section 1981a, not section 706(g), so the caps simply have no application to remedies—including front pay—that were available under section 706(g).

These circumstances compel the conclusion that front pay awards are not governed by the monetary caps contained in section 1981a. If the statutory language left

any doubt, the legislative history ends it. The Sponsors' Interpretive Memorandum makes clear that the newly created—and capped—damages "cannot include backpay, the interest thereon, front pay, or any other relief authorized under Title VII." 137 Cong. Rec. S15, 484 (1991). Senator Kennedy, in reporting the final version of the bill to the Senate, stated that "[c]ompensatory damages do not include frontpay." 137 Cong. Rec. S15234 (daily ed. Oct. 25, 1991). Similarly, Representative Edwards reported to the House of Representatives that front pay, like back pay, is not included in the definition of compensatory damages in section 1981a. 137 Cong, Rec. H9527 (daily ed. Nov. 7, 1991).

All the Courts of Appeals that have considered the question, except the Sixth Circuit, have found the caps contained in the 1991 Act inapplicable to front pay. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000); *Kramer v. Logan County School Dist.*, 157 F.3d 620, 626 (8th Cir. 1998); *Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir. 1999); *Martini v. Federal National Mortgage Association*, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999). In a policy guidance adopted after passage of the 1991 Act, the Equal Employment Opportunity Commission concurred. It concluded that "complaining parties may recover full compensation for . . . frontpay . . . . Frontpay is a type of 'relief authorized under Title VII' and, therefore, is excluded from the definition of compensatory damages and is not included in the caps." *See* EEOC Policy Guide on Compensatory and Punitive Damages Under the 1991 Civil Rights Act, 8 FEP Manual

405:7091, 7094 (1992).[6]

The lower court here found itself bound by the Circuit's earlier decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997). *Hudson*, alone among the Courts of Appeal, had concluded that front pay awards *are* subject to section 1981a's monetary caps. It reasoned first that front pay falls within the meaning of the phrase "future pecuniary losses" contained in section 1981a's definition of compensatory damages, and second, that front pay is not "specifically" authorized by section 706(g). 130 F.3d at 1203. Neither reason is persuasive. Both fail "to understand the relevant statutory terms 'in light of the language and structure of the Act as a whole.'" *Medlock v. Ortho Biotech, Inc.*, *supra*, 164 F.2d at 556, quoting *Dole v. United Steelworkers of America*, 494 U.S. 26, 41 (1990). Thus, while it is true that front pay may be a form of future pecuniary loss, the cap by its own terms does not apply to all "future pecuniary losses;" rather its application is limited to "compensatory damages awarded under this section for future pecuniary losses." 42 U.S.C. §1981a(b)(3). Damages "awarded under *this* section"—section 1981a—obviously do not include damages or relief awarded under the authority of section 706(g). And as indicated previously, compensatory damages are defined as being exclusive of relief available under section 706(g).

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[6] These EEOC regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). This Court has held that such a contemporaneous interpretation, which is consistent with the language of the statute, is entitled to great deference. *Washington County v. Gunther*, 101 S.Ct. 2242, 2461, 452 U.S. 161 (1981).

The Sixth Circuit's conclusion that front pay is subject to the caps because it is not "specifically" authorized by section 706(g) is also plainly wrong. As we have seen, section 706(g) does not specifically enumerate the relief a district court may award. To the contrary, it authorizes the award of "such affirmative action as may be appropriate," including reinstatement or backpay and "any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). Section 1981a provides that the compensatory damages it authorizes are "in addition to any relief authorized by Section 706(g)," and it excludes from the definition of compensatory damages "any other type of relief authorized under Section 706(g)." 42 U.S.C. §1981a(a)(1) and (b)(2). Thus, in holding that front pay falls within section 1981a's caps because it is not "specifically" authorized by section 706(g), the Sixth Circuit has added a requirement to section 1981a that drastically alters its meaning. Section 706(g) was written clearly to permit the award of broad equitable relief beyond what is "specifically" mentioned. Section 1981a was written so as to respect this breadth. It uses the phrases "any relief" and "any other type of relief authorized under Section 706(g)" to define the exclusions from its definition of compensatory damages. To give section 1981a the meaning ascribed to it by the Sixth Circuit it would be necessary to add the words "specific" and "specifically" to section 1981a(b)(2) and (3).[7] Such editing is not a

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[7] *Hudson* also concluded that front pay should be included in the caps because otherwise the phrase "future pecuniary losses" would not have any meaning. *See* 130 F.2d at 1203. However, this is simply not the case. A victim of discrimination may well suffer future pecuniary loss over and above lost

(continued...)

function of the judiciary—at least not where the meaning of the language used by Congress is so clear.

C. Application Of The Damage Cap To Front Pay Will Frustrate The Purposes Of The 1991 Act.

An early factor driving the courts to award front pay was the unavailability of an appropriate position for the victim of discrimination. In some cases there was a concern that immediate reinstatement or promotion would unfairly displace innocent incumbent employees; in others, an appropriate position was not immediately available. In these circumstances, the courts readily awarded front pay during the interim between the entry of judgment and the time when it became possible to effect reinstatement or promotion. *See* cases cited, *supra*, and *see also e.g., Chewning v. Seamans*, 28 FEP Cases 1735, 1740-41 (D.D.C. 1979) (a class member is entitled to front pay until he reaches his "rightful place."); *Stamps v. Detroit Edison Co.*, 30 FEP Cases 1805, 1813-14 (E.D. Mich. 1978) (front pay to continue until person discriminated against reaches her rightful position or its equivalent, or refuses opportunity for same); *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984) (front pay to continue until plaintiff is assigned to the position he was denied or a comparable one); *Parker v. Heckler*, 801 F.2d 709, 713 (4th Cir. 1986) (front pay to continue until plaintiff can be reinstated to "substantially equivalent" position); *Carter*

(...continued)
salary or benefits. Losses such as medical expenses, fees for therapy, and moving expenses are some examples.

v. Community Action Agency, 625 F.Supp. 199, 207 (M.D. Ala. 1985) (front pay awarded to a discharged employee where no comparable position was available); *Parker v. Siemens-Allis, Inc.*, 601 F.Supp. 1377, 1389 (E.D.Ark. 1985) (same); *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990) (front pay awarded in part because reinstatement would disrupt another employee).

However, other considerations have also prompted the courts to award front pay in lieu of reinstatement. For example, certain kinds of employment require a degree of trust and confidence that is irreparably damaged after a disputed termination followed by contentious litigation. In such circumstances common sense dictates that reinstatement is simply not feasible. *See e.g., EEOC v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1203 (2nd Cir. 1976).

Other courts have found, more generally, that reinstatement is inappropriate where there is evidence of "extreme animosity between the plaintiff and the defendant employer." In such circumstances, "although reinstatement would technically make the plaintiff whole, larger considerations of the relationship between the plaintiff and the employer, and, indeed, the environment in which their relationship is situated, militate against ordering reinstatement." *Webb v. District of Columbia*, 146 F.3d 964, 976-77 (D.C. Cir. 1998). *See also Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1066 (8th Cir. 1988) (front pay appropriate given "substantial animosity" between plaintiff and employer, where "relationship was not likely to improve, and the nature of the business required a high degree of mutual trust and con-

fidence"); *Spulak v. KMart Corp.*, 894 F.2d 1150, 1157-58 (10th Cir. 1990) (front pay awarded rather than reinstatement where employee was forced to retire having been humiliated in front of the employees he was supposed to supervise, and where antagonism between the parties was increased by "bitterly contested" litigation); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890 (3rd Cir. 1984) (front pay awarded at conclusion of acrimonious litigation for female employee who had held a sensitive position as a sales representative).

Some courts have also expressed a marked preference for front pay in order to avoid judicial responsibility for monitoring the success of a court-ordered reinstatement. *See e.g., Price v. Marshall Erdman & Associates, Inc.*, 966 F.2d 320, 325-6 (7th Cir. 1992):

> It is one thing to order the reinstatement of low-level employees performing routine tasks, or higher-level employees after the supervisors involved in the unlawful employment action have left the company or been transferred to another division. But to order reinstatement of a high-level employee performing discretionary functions into the division from which he was fired and which remains under the management of the person who fired him is a formula for continuous judicial intervention in the employment relation. . . . A federal district court is not equipped to be the labor relations equivalent of a domestic relations court. Reinstatement in the circumstances that we have described would be justified only if front pay could not be computed.

See also McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990) ("Courts of equity traditionally have refused to order specific performance of employment

contracts, because it is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment.").

Although *amici curiae* have not conducted a formal survey, they can say with considerable assurance that their members' clients involved in single-plaintiff claims of gender discrimination seldom seek or receive reinstatement as a remedy, for all the reasons recognized by the courts of appeals in the decisions just cited.[8] For these plaintiffs, the Sixth Circuit's construction will have a significant negative impact—one we submit was clearly not intended by the 1991 Act.

These circumstances are graphically illustrated in the instant case, where the evidence convincingly demonstrated both the need for front pay as an alternative to reinstatement and the propriety of an award of compensatory damages over and above the relief traditionally available under section 706(g) of Title VII. Sharon Pollard endured a prolonged—indeed seemingly interminable—period of gender-based discrimination and harassment. DuPont's own psychologist confirmed the psychological damage caused by the discrimination and harassment. She was ultimately fired when, having been on disability leave prompted by the effects of the discrimination and harassment, DuPont would only reinstate

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[8] One commentator has suggested that the courts should relax the preference for reinstatement and recognize that front pay is more often the appropriate remedy. *See* Grebeldinger, *The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay*, 1996 U.Ill.L.Rev. 319 (1996).

her to the same position she had left and under the individual who had been her principal harasser. It is hard to imagine a more compelling case for an award of front pay: reinstatement would almost surely cause the plaintiff further injury, and it would be impossible to conclude that the working relationship would be anything but the most hostile. At the same time it is difficult to imagine a more compelling case for compensatory damages. Certainly the District Judge who tried the case without a jury found it compelling, awarding the full amount authorized by the 1991 Act.

The 1991 Act was enacted with cases like Mrs. Pollard's in mind. By its terms, it was intended to expand the monetary relief available to victims of employment discrimination. Back pay and reinstatement or front pay were found insufficient to compensate victims of discrimination for the injury "to their careers, [their] mental and emotional health, and [their] self-respect and dignity." *See* House Report No. 102-40(I) (1991) at 66. It is equally clear that Congress had no intention of limiting the relief that was already available under Title VII. The Sixth Circuit's reasoning turns this Congressional intent on its head. Victims of gross gender-based mistreatment like that visited on Mrs. Pollard can recover the full compensatory damages allowed, but are cut off from front pay, while a less harshly treated plaintiff can receive the compensatory damages allowed by the 1991 Act and return to her job. In other words, employees who are able to be reinstated can receive the full benefit of the augmented relief contained in the 1991 Act, while those who, because of the recalcitrance of their employer cannot be reinstated, will receive less.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge that the judgment below be reversed and the case remanded for consideration of an award of front pay.

Respectfully submitted,

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